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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 414

BENJAMIN HALL,
*Petitioner*

vs.

UNITED STATES OF AMERICA

**Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit**

JAMES F. KEMP
JOHN M. JOHNSON
*Attorneys for Petitioner*

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Benjamin Hall prays that a writ of certiorari be issued to review the judgment of the Circuit Court of Appeals for the Fifth Circuit, entered in the above entitled cause July 11, 1945, (order denying motion for rehearing entered August 14, 1945), affirming the orders and judgments of the District Court of the United States for the Southern District of Georgia which overruled petitioner's motion for a directed verdict.

## ORDERS AND JUDGMENTS BELOW

The order and judgment of the court overruling petitioner's motion for a directed verdict appears in the

record at pp. 139, 155. The opinion of the Circuit Court of Appeals appears in the record at p. 197.

## JURISDICTION

The judgment of the Circuit Court of Appeals was entered July 11, 1945 (R. 200), and the order denying a rehearing was entered August 14, 1945 (R. 204). The jurisdiction of this court is invoked under Sec. 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

## QUESTIONS PRESENTED

(1) Was the evidence sufficient to authorize the conviction of petitioner.

(2) Did the court err in affirming the judgment of the District Court which permitted the Assistant United States District Attorney to seek to impeach a Government witness in such a way as to disclose to the jury ex parte statements in the nature of hearsay evidence which were favorable to the Government and hurtful to petitioner.

(3) Did the court err in affirming the District Court in subjecting a Government witness to a long and gruelling cross-examination in such a manner as to disclose to the jury ex parte statements in the nature of hearsay which were favorable to the Government's case and which were hurtful to petitioner.

(4) Did the court err in affirming the judgment of the District Court in refusing to rule out hearsay testimony.

## STATUTE INVOLVED

The statute involved is Sec. 88 of Title 18 U. S. C.; Criminal Code, Sec. 37; Revised Statute, Sec. 5440, and will be found in the Appendix, infra, p. 8.

## STATEMENT

Petitioner was indicted at the May Term 1943 by a United States Grand Jury in and for the Augusta Division of the Southern District of Georgia (R. 1). The indictment contained four counts and charged petitioner with a conspiracy to violate various provisions of the Internal Revenue Laws. Petitioner went to trial on the 22nd day of November 1944 and the jury returned a verdict of guilty on counts 1, 3 and 4 on the 27th day of November 1944 (R. 8). On January 6, 1945, the court sentenced petitioner to serve a sentence of two years on count 1; six months on count 3 and six months on count 4 and to pay a fine of $5000.00 on count 1, and $500.00 on each of counts 3 and 4 (R. 9-10).

The pertinent facts, as disclosed by the evidence, are substantially as follows:

Petitioner resides in the City of Atlanta approximately 175 miles from Augusta. He was jointly indicted with Raymond J. Davis, Grady Parks, Olin Luther Gaddis, Luther Tate Connor, Ernest Cecil Tanner, Wesley Howard Roberts, James Wesley Perry, Musgrove Young and George Washington Wright. Petitioner was never apprehended at any distillery nor was he ever apprehended with any non-tax paid whiskey or with any contraband which would definitely connect him with the crimes charged.

The chief co-conspirator, Roy Pirkle testified:

> "I never did see Ben Hall in Richmond County. As to did I ever see him anywhere, not that I know of. I never did have any contact with him. As to would I know whether he ever came to Richmond County or Burke County, no, sir, I wouldn't know" (R. 18).

He further testified:

> "Grady Parks, Gaddis and Davis made the arrangements, the others did not have anything to do with it. Ben Hall did not have anything to do with it" (R. 24).

The trial court permitted Ruth Pirkle, wife of Roy Pirkle, to testify over objection that she heard a conversation between Parks, Gaddis and her husband that Ben Hall was to get one-fourth of the profits (R. 32). She testified that Hall was not present and according to her testimony she only saw Hall in Richmond County on one occasion (R. 40). She did not testify that Hall was ever seen in connection with any liquor transaction. She testified as to certain conversations she had with Grady Parks and Raymond Davis about Ben Hall (R. 35-36) and she testified that defendant Roberts came to Augusta and stated that he had just gotten out of jail with the assistance of Ben Hall (R. 37).

All the evidence against petitioner was purely circumstantial except the hearsay testimony of the witness, Ruth Pirkle. The circumstantial evidence was too remote to definitely connect petitioner with the crimes charged. He was convicted of a conspiracy to violate the Internal Revenue Laws and was also convicted of possessing two

illicit distilleries, although there is no evidence in the record to connect him with these offenses.

At the conclusion of all of the evidence petitioner moved for a directed verdict upon the grounds that the evidence was insufficient to warrant his conviction. This motion was overruled (R. 155). A motion was also made to rule out the hearsay testimony delivered by witness, Mrs. Ruth Pirkle (R. 48).

Petitioner was sentenced to serve two years on count 1 of the indictment and to pay a fine of $5000.00; he was sentenced to serve six months on each of counts 3 and 4 and to pay a fine of $500.00 upon each of said counts.

Upon appeal by petitioner to the Circuit Court of Appeals for the Fifth Circuit the judgment of the court below was affirmed (R. 200).

## SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that the District Court of the United States did not err in refusing to direct a verdict for petitioner on the ground that the evidence was insufficient to warrant his conviction.

2. In holding that the District Court did not err in permitting the Assistant United States Attorney to seek to impeach a Government witness in such a way as to disclose to the jury ex parte statements in the way of hearsay evidence which were favorable to the Government and hurtful to petitioner.

3. In holding that the District Court did not err in

subjecting a Government witness to a long and gruelling cross-examination in such a way as to disclose to the jury ex parte statements in the nature of hearsay which were favorable to the Government and hurtful to petitioner.

4. In holding that the District Court did not err in refusing to rule out the hearsay testimony of the witness, Ruth Pirkle.

5. In not reversing the judgment of the District Court.

## REASONS FOR GRANTING THE WRIT

The first question involved is whether the evidence was sufficient to warrant the conviction of petitioner.

One cannot be held as a member of a conspiracy upon mere proof that he had knowledge of it or negatively acquiesced in the offense. There must be active participation in the crime.

*United States v. Falcone,*
311 U. S. 205

The evidence against petitioner was of such character that it was necessary to rely on remote circumstances in order to hold that he was guilty. Petitioner was not connected with any transaction that was *per se* illegal. There is no direct evidence that he entered into a conspiracy with any person and there are no circumstances disclosed by the evidence which are sufficient to warrant the holding that there was a conspiracy existing between petitioner and other parties. There was no evidence that petitioner was ever present at either one of the illegal distilleries or that he owned or possessed them. The evi-

dence relating to Hall was entirely circumstantial except the testimony of Mrs. Pirkle which we contend was illegally admitted as being hearsay.

The offense of conspiracy is separate from various crimes which may be objects of conspiracy.

*O'Brien v. United States,*
51 F. (2d) 674 (13) (7 C.C.A.)
*Graham v. United States,*
15 F. (2d) 740 (3) (8 C.C.A.)
*Hall v. United States,*
78 F. (2d) 168 (1) (10 C.C.A.)

Though a defendant be guilty of a conspiracy to commit a substantive offense, he is not necessarily guilty of the substantive offense.

*United States v. Cusimano,*
123 F. (2d) 611 (2) (7 C.C.A.)

*Beland v. United States,*
117 F. (2d) 958 (3) (5 C.C.A.)

The second and third questions relate to the manner and method of the cross-examination of Government witness, Robert M. Moore, by the trial judge and in his ruling permitting the prosecuting attorney to seek to impeach the witness. The examination by the court and by the prosecuting attorney disclosed to the jury ex parte statements in the nature of hearsay which were favorable to the Government and hurtful to petitioner.

The Fifth Circuit Court of Appeals has held that it is not permissible for one to impeach his own witness unless he has been surprised and his case prejudiced by the testimony.

*Young v. United States,*
97 F. (2d) 200-205

The fourth question involved pertains to the court's ruling with reference to the hearsay testimony delivered by the witness, Ruth Pirkle. Her testimony was clearly not declarations of a co-conspirator in furtherance of the alleged conspiracy. They were mere narrations of past events.

*Clark v. United States,*
61 F. (2d) 409 (3) (5 C.C.A.)
*United States v. Goodman,*
129 F. (2d) 1009 (4) and citations

For all of the foregoing reasons it is respectfully submitted that the petition for writ of certiorari should be granted.

JAMES F. KEMP

JOHN M. JOHNSON
*Attorneys for Petitioner*

## APPENDIX

Section 88 of Title 18 U. S. C.; Criminal Code Sec. 37 provides:

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both. (R. S. Sec. 5440; May 17, 1879, c. 8, 21 Stat. 4; Mar. 4, 1909, c. 321, Sec. 37, 35 Stat. 1096.)"